

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1995 SESSION

FILED

November 15, 1995

Cecil Crowson, Jr.

V.

Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

GREGORY LAMONT TURNER,

SHONE D. KING,

LARRY E. DAVIS, and

DAVID CLARK,

Defendants/Appellants.)

) C.C.A. # 01C01-9402-CR-00068

)

) DAVIDSON COUNTY CRIMINAL COURT,

) DIVISION II

) Hon. J. RANDALL WYATT, JR., JUDGE

) (Turner, King, Davis:

) Aggravated assault, aggravated

) burglary, aggravated robbery,

) aggravated rape (3 counts).

) Clark: Aggravated burglary,

) aggravated robbery).

FOR APPELLANT DAVIS:

GEORGE J. DUZANE
One Church Street, Suite 300
Nashville, TN 37201

FOR APPELLANT TURNER:

R.N. TAYLOR
P.O. Box 148058
Nashville, TN 37214

FOR APPELLANT KING:

JAMES B. BARR, III
713-B Main Street
Nashville, TN 37215

FOR APPELLANT CLARK:

THURMAN T. McLEAN, JR.
221 N. Fourth Ave., 5th Floor
Nashville, TN 37219

FOR THE APPELLEE (STATE):

CHARLES W. BURSON
Attorney General and Reporter

MERRILYN FEIRMAN
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

VICTOR S. JOHNSON, III
District Attorney General

NICHOLAS BAILEY
PAUL DEWITT
Asst. Dist. Attorneys General
Washington Square, Suite 500
222 Second Avenue North
Nashville, TN 37201-1649

OPINION FILED: _____

JUDGMENTS AFFIRMED; SENTENCES AFFIRMED AS MODIFIED

GARY R. WADE, JUDGE

OPINION

The defendants, Gregory L. Turner, Shone D. King and Larry E. Davis, each appeal as of right from their respective convictions for aggravated assault, aggravated burglary, aggravated robbery and three counts of aggravated rape. Each was sentenced as a Range I offender to consecutive sentences of six years for aggravated assault, six years for aggravated burglary, twelve years for aggravated robbery, and twenty-five years for each of the three aggravated rape convictions. The effective sentence for each of the three was ninety-nine years. David Clark appeals from his convictions for aggravated burglary and aggravated robbery. He received consecutive sentences of six and twelve years respectively.

Davis, King and Turner question the legal sufficiency of the convicting evidence; all four question the appropriateness of the sentences set; Turner questions the admission of DNA test results; Davis claims error because the trial judge refused to instruct the jury on the law regarding the offense of facilitation of a felony and refused to grant a severance. The defendant Davis also claims error because the trial court refused to allow the female rape victim to be cross-examined about an alleged prior history of rapes.

We have reviewed the record, the briefs of all parties, and the relevant case and statutory law. For the reasons hereinafter stated, we affirm the judgments entered against the defendants Turner, King, and Davis. The defendant Clark's convictions are affirmed; it is only because he fails to meet

the technical definition of a "dangerous offender" that his sentences are modified to be served concurrently rather than consecutively.

I

The following description of the crimes is well supported by the evidence, was accepted as fact by the jury, and the verdicts were approved by the trial judge. It presents a picture of the victimization of an innocent female victim in a manner and to a degree that demands the full measure of punishment permitted under law.

In 1992, on the night before Easter Sunday, the forty-seven-year old victim, a former school teacher, returned to her home at about 9 p.m. She lived alone. After performing a few household chores, she sat down to read. Nearly an hour had passed since her return to her residence when she heard a loud knock at the front door. Expecting a summons from one of the neighborhood children, who frequently visited with her, the victim opened the door and was confronted by the defendant King, whom she had never seen before. When King asked where her man was, the victim attempted to close the door. King, however, forced his way into her home and was immediately followed by Turner and Davis, and later by Clark, all of whom had apparently arrived together in the same vehicle.

King sauntered around in an open area between the living room and dining room as if he owned the place. Davis grabbed the victim by her left arm. The three intruders then demanded

money. When the victim told them that she only had three dollars in her purse, a savage assault ensued. Davis jerked the victim around and threw her against a divider. Turner jerked the victim by the arm and King hit her across the face. King then placed a pistol in the victim's face, demanding money. Davis and Turner also demanded to know the whereabouts of her money. When she was again struck by her assailants, the victim crashed into a table so hard that it made an indentation into the wall behind it. The victim was struck on the side of her head and knocked to the floor. When she tried to get up to locate her purse, she was again knocked to the floor. Turner then grabbed her by her hair and pulled her down the hallway. The appellants claimed that they had been told that the victim had both money and a gun and they wanted both. When the victim attempted to explain that she had no money and had no gun, the three assailants became even more agitated and struck her repeatedly. The three men passed the gun among themselves and each held the weapon to her head a number of times. They ransacked each room in her house, senselessly destroying many of the contents.

King then announced, "I mean to have me some of this white pussy." By then, the victim had been dragged to her bedroom; Turner and Davis, however, momentarily tried to persuade King to leave because they had been in the house for such a long time and feared detection. King then pushed Turner and Davis out of the room, pulled down the victim's pants, pushed her down on the bed, and pried her legs apart with his knees. Although King had an erection, he had a

difficult time achieving penetration. He first penetrated her vagina with his tongue and then with his penis.

Turner and Davis had at times watched the initial rape from the bedroom doorway. The victim had pleaded with them for help. During the course of the rape, each had helped hold apart the victim's legs in an effort to facilitate the rape. They had located her purse and had dumped the contents on the bed. Davis had the gun during the initial assault, called the victim a "bitch," and threatened to shoot her.

While King was still atop the victim, raping her vaginally, Davis grabbed the hair of the victim's head and forced his penis into her mouth. He threatened to kill her if she bit him.

When Davis finished his assault, Turner then forced his penis into the mouth of the victim. Thereafter, Turner and King penetrated her anally. The three assailants smothered the screams of the victim. Turner penetrated her vagina with his penis. The others watched gleefully and reported to each other the details of the rape. The three men used hand lotion to help achieve vaginal and rectal penetration. The anal penetration again brought forth screams from the victim which Davis thwarted. When the victim begged for relief, the three assailants laughed and joked. King pulled Davis off of the victim, and then he also raped her anally.

During the various assaults, the victim could hear a

clicking of the gun and feared the three men intended to kill her. King again raped her vaginally. When the victim cried, King told her not to feel sorry for herself that she asked for it. He also told her that he had taken the muffler off her car to keep her from going for help.

Sometime during the course of the assault, the defendant Clark entered the house. Clark had found her garden gloves in the storeroom, and held them in his hands as he stood in the bedroom doorway for five or ten seconds. A word processor and a television were taken. When the four defendants finally left, the victim went out her back window to a neighbor's house to summon police.

II

The law governing whether the evidence is sufficient is well established. Where the sufficiency of the evidence is challenged the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); State v. Williams, 657 S.W.2d 405, 410, cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

Davis argues that the evidence is insufficient because none of the scientific evidence indicated that he was even present on the night of the crime. This argument is overcome by the victim's testimony, which was accredited by the jury

and approved by the trial judge, that Davis orally, anally and vaginally penetrated the victim with his penis.

King argues that the victim's identification of him is unreliable because there was no DNA match between him and the samples taken from the bodily fluids left on the victim's body. His argument fails for the same reason.

Turner relies upon alleged contradicting statements by the victim and alleged lack of credibility by the State's witness, Buie, a convicted felon. In fact, all of the appellants challenge the credibility of the State's witnesses. Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are to be resolved by the trier of fact. This court may not substitute its judgment. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). It is also worthy of note that Turner entered unconditional pleas of guilt to aggravated burglary and one count of aggravated rape.

Any contentions that the evidence was insufficient are without merit.

III

The defendant Turner contends that the trial court erred by admitting into evidence the testimony of an FBI expert on DNA testing. Because he has failed to cite authority in support of this complaint, the issue is waived. Tenn. R. App.

P. 27(a); State v. Chance, 778 S.W.2d 457, 462 (Tenn. Crim. App. 1989); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988).

Moreover, Turner pled guilty to anal rape. His argument is that since his sperm could have been deposited on the victim's vaginal area as a result of the anal rape, the DNA evidence should have been excluded as to the other rape charges against him. We disagree. In our view, the trial court had the discretionary authority to allow this evidence to go to the jury on the issue of vaginal rape. State v. Baker, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1989). There appears to have been no abuse of that discretion here.

IV

Davis claims that the trial court erred in denying his request for an instruction to the jury on facilitation of a felony. Criminal responsibility for the facilitation of a felony is defined as follows:

A person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2),¹ the person knowingly furnishes substantial assistance in the commission of the felony.

Tenn. Code Ann. § 39-11-403(a). Our court has stated that facilitation of a felony can be a lesser included offense of a greater charge and should be given in the jury charge where

¹§ 39-11-402(2) states that a person is criminally responsible for the conduct of another if "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense."

its application is fairly raised by the facts. State v. Hicks, 835 S.W.2d 32 (Tenn. Crim. App. 1992). While there were facts in this case which may have supported charges of facilitation of a rape by a codefendant, the state's election at the close of the proof eliminated any consideration of the issue. The state specifically opted to rely upon the victim's testimony that she was orally, anally, and vaginally raped by Davis with "his penis," else he was guilty of nothing at all. The theory was that Davis was responsible for his own actions, but not those of the other defendants. Under these circumstances, the trial court did not err in denying the defendant's request to charge facilitation of a felony.

V

The trial court denied a pretrial motion by Davis for a severance. Later, when Turner entered a guilty plea to two charges, the severance motion was not renewed.

Given that all of the defendants were involved in the same burglary and robbery and three of them charged with the same aggravated assault and aggravated rapes, joinder of the trials of all was appropriate. There is no showing that Davis was prejudiced by being tried jointly. He was prejudiced, quite properly, by the proof of his guilt. In the absence of a clear showing of prejudice to a defendant due to the joint trial, the trial court has the discretionary authority to deny a severance. In our view, the trial court acted within that authority. Hoskins v. State, 489 S.W.2d 544, 545 (Tenn. Crim. App. 1972); see also Tenn. R. Crim. P. 14.

VI

Davis submits that it was error for the trial court to disallow his attempt to question the victim about her having been assaulted or raped on a prior occasion. The record contains little about the prior incident. There is a statement by the prosecutor that the victim had been subjected to a date rape some twenty-six or twenty-eight years ago. The incident did not require the victim to testify otherwise appear in court. Davis's counsel made the following statement:

I'd like to preserve the record and take exception to that, for this reason. Not necessarily the incidents that occurred with her are important, but if, in fact,

she's testified on other occasions, in other courts, before other juries, it would go to show that even though she is accurate or appears to be accurate in her testimony in this trial, that possibly her prior testimony in other matters would show a credibility at issue, due to the fact that she's got courtroom experience and she testified on numerous occasions.

Obviously, the theory presented for the admission of this cross-examination was not supported by the facts. Because the trial court properly disallowed this cross-examination, the issue is without merit.

VII

All four defendants received the maximum Range I sentence for each conviction; all of the sentences were ordered to be served consecutively. Each defendant now challenges the trial court's application of various sentencing factors and the imposition of consecutive sentences.

A. Length of Sentence

When a challenge is made to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a "de novo review ... with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the

arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210.

The presumption of correctness given to the trial court in its sentencing determinations is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166 (Tenn. 1991). Where the trial court applies inappropriate factors or fails to follow the provisions of the sentencing act, the presumption fails. State v. Shelton, 854 S.W.2d 116 (Tenn. Crim. App. 1992). Here, the trial judge found numerous enhancement factors generally applicable to all offenses in reaching the maximum sentence for each defendant. It failed, however, to consider whether each of the factors applied to each of the convictions of the four defendants. Because this failed to comport with the requirements of Ashby, the sentences are not entitled to the statutory presumption of correctness.

1. Factors

a. Previous history of criminal convictions or behavior (Tenn. Code Ann. § 40-35-114(1))

The trial judge applied this factor to defendants King, Turner, and Davis. Our review of the record supports the finding that these three defendants had "a previous history of

criminal convictions or behavior beyond that necessary to establish the range of punishment." We also find that the application of this factor to each of these defendants for each offense is appropriate.

**b. Leader in the commission of the offenses (King Only)
(Tenn. Code Ann. § 40-35-114(1))**

The trial court found that the evidence supported the application of this factor as to defendant King. We agree. King forced his way into the victim's home before anyone else; he initiated the assault of the victim. The victim described King as the most aggressive of her assailants. She also testified that defendants Turner and Davis, initially concerned about being caught if they stayed too long, tried to get King to leave before he committed the first rape of the victim. King pushed them out of the way to get to the victim. Under these circumstances, the record fully supports the application of this factor to each offense for which defendant King was convicted.

c. The defendant treated or allowed the victim to be treated with exceptional cruelty (Tenn. Code Ann. § 40-35-114(5))

This factor was applied to all four defendants by the trial court. The defendants allege that the record does not support a finding that these acts were "exceptionally" cruel. The victim testified that she heard a gun clicking throughout the ordeal. While she did not say whether all four defendants had actually held the gun to her head, clearly more than one had done so. Each of the defendants searched and ransacked her home. They repeatedly struck her, demanded money, and sought a gun which she did not have. Each of the defendants laughed and made jokes during the rapes saying things like they were going to "f___ [[her] in the a___," "you're in her a___, no you're in her c___," and "you asked for it." The record supports the application of this factor to defendants

King, Turner, and Davis on each conviction.

We also find that the record establishes that the defendant Clark "allowed" the victim to be treated with exceptional cruelty. Although not directly involved in the assaults, Clark had to be aware of what was happening and understood the seriousness of the assault. Yet he made no protests and did little or nothing to help the victim. Thus, this factor was properly applied to Clark for each of the offenses.

d. The victim sustained particularly great personal injuries or property damage (Tenn. Code Ann. § 40-35-114(6))

The trial court held that the victim suffered "particularly great" personal injuries and property damages. At the sentencing hearing, the victim testified extensively about the extreme emotional trauma that the offenses had caused. She described in some detail their adverse impact on her life. She had installed numerous safety devices and supplemental lighting in her residence as a result of her fears. During the burglary, the defendants knocked holes in her walls and broke furniture. Her home was completely torn apart. The victim had a number of bruises, internal injuries, and lacerations as a result of these offenses. She was almost immobile for at least a week after the offense. The testimony supports the application of this factor to defendants King, Turner, and Davis for their aggravated robbery, aggravated burglary, and aggravated rape convictions.

When considering whether this factor applies to the aggravated assault convictions, courts must adhere to the guidelines established in State v. Jones, 883 S.W.2d 597 (Tenn. 1994). In that case, our supreme court held that this factor could not be applied to an aggravated assault because it was an essential element of the offense; it ruled that "serious bodily injury" and "particularly great personal injury" were the same. If the only injuries suffered by the victim in this case were bodily injuries, then Jones would prohibit the application of this factor to this offense. Here, however, the victim also suffered significant property damage. Thus, this factor is also applicable to the aggravated assault by defendants King, Davis, and Turner.

The victim testified that defendant Clark did not harm her during the offenses. Defendant Clark argues that "[a]lthough the victim [sustained] property damage in the form of a stolen word processor plus the disarray of her home . . . , this is not 'extreme' property damage." While this factor may weigh more heavily against defendants King, Turner, and Davis, we reject Clark's argument that it should not apply to him. This factor applies to defendant Clark's aggravated robbery and aggravated burglary convictions based upon his participation in helping ransack the victim's house.

e. The offense was committed to gratify the defendant's desire for pleasure (Tenn. Code Ann. § 40-35-114(7))

This factor was applied to defendants Turner, King, and Davis. They first argue that the record does not support the application of the factor. Secondly, they claim the factor

cannot be used because it is an element of the offense of aggravated rape. This court has previously determined that this factor is not an essential element of aggravated rape. State v. Adams, 864 S.W.2d 31, 34-35 (Tenn. 1993). The state does, however, have the burden of proving that the rape was sexually motivated, i.e., that it was done to gratify the defendant's desire for pleasure or excitement. Id.

In our view, the record clearly supports the trial court's application of this factor to the aggravated rape convictions of King, Turner, and Davis. The record does not, however, support its application to the assault, robbery, or burglary offenses.

f. The defendant has a previous unwillingness to comply with the conditions of sentence involving release in the community (Tenn. Code Ann. § 40-35-114(8)) (Davis Only)

Davis's presentence report and testimony at the sentencing hearing establish that he committed offenses as a juvenile while on probation. Accordingly, the record supports the application of this factor for each of defendant Davis's convictions.

g. The defendant possessed or employed a firearm during the offense (Tenn. Code Ann. § 40-35-114(9))

The trial court also applied this factor to all four defendants. The record supports the finding that a weapon was used during the offenses. This factor, however, may not be applied where it is an essential element of the offense. Tenn. Code Ann. § 40-35-114; State v. Jones, 883 S.W.2d 597, 599-600 (Tenn. 1994). The use of a firearm was an essential

element of the aggravated robbery as charged in the indictment. Therefore, the use of a firearm may not be used to enhance any of these defendants' sentences for aggravated robbery.

This factor is not an essential element of the remaining offenses. At least one of the defendants has argued that it is an essential element of the aggravated rape. While the use of a firearm may be an element of an aggravated rape, the indictment here relied upon one of the other listed aggravators in the statute. See Tenn. Code Ann. § 39-13-502 (aided or abetted by more than one person). Accordingly, the record supports this factor's application to each defendant's convictions for aggravated burglary and to the remaining offenses for defendants King, Turner, and Davis.

h. The defendant had no hesitation about committing a crime when the risk to human life was high (Tenn. Code Ann. § 40-35-114(10))

This factor was applied to defendants Turner, Davis, and Clark without specifying the offenses. The trial court failed to make a finding on this factor as it related to King. As previously stated, a factor may not be applied where it is an essential element of the offense. Because every armed robbery includes a high risk to human life, our courts have held that this factor is inapplicable where the only risk to human life is the risk to the victim. State v. Hicks, 868 S.W.2d 729, 732 (Tenn. Crim. App. 1993). Accordingly, this factor would not apply to any of the defendants' convictions for aggravated robbery.

This factor would, however, be applicable to the remaining offenses by the four defendants. The facts clearly demonstrate that there was a high risk to the victim's life throughout the offenses.

2. Appropriateness of Sentence

a. Defendant Turner

In our review, we have found six enhancement factors applicable to defendant Turner's aggravated rape convictions; five factors applicable to his aggravated burglary and aggravated assault convictions; and three factors applicable to his aggravated robbery conviction. The defendant, age 21 at the time of the offenses, argued that his youth should have been considered as a mitigating factor. See Tenn. Code Ann. § 40-35-113(6). We agree with the trial court that no mitigating factors were applicable to this defendant. We have weighed the applicable factors and find that they support the imposition of the maximum sentence for each offense.

b. Defendant King

Seven enhancement factors apply to defendant King's aggravated rape convictions; six factors apply to his aggravated burglary and aggravated assault convictions; and four factors apply to his aggravated robbery conviction. The defendant does not argue any mitigation and we do not find that any exists. After weighing the applicable factors, we find that they support the imposition of the maximum sentence for King for each offense.

c. Defendant Davis

Seven enhancement factors apply to Davis's aggravated rape convictions; six factors apply to his aggravated burglary and aggravated assault convictions; and four factors apply to his aggravated robbery conviction. The defendant argues that because he tried to initially stop defendant King from raping the victim that he is entitled to mitigation. See Tenn. Code Ann. § 40-35-113(12) (acting under the domination of another person). The evidence, however, does not support this contention. After being pushed out of the way by King, Davis then voluntarily re-entered the bedroom and joined in the sexual assaults. In addition, the victim stated that the only reason Davis attempted to stop King was out of concern for "expediency." After weighing the applicable enhancing factors, we find that they support the imposition of the maximum sentence for Davis for each offense.

d. Defendant Clark

Four enhancement factors apply to Clark's conviction for aggravated burglary and two factors apply to his conviction for aggravated robbery. Clark claims that three mitigating factors should also apply: (1) substantial grounds exist tending to justify or excuse the defendant's criminal conduct, (2) he lacked substantial judgment because of his youth, and (3) he acted under duress or the domination of another. Tenn. Code Ann. § 40-35-113(3), (6), and (12). At the time of the offenses, Clark was eighteen years old. He claims that he tried to get everyone to leave when he saw the victim and that he had no control over the others. Testimony by the victim

corroborated portions of his claims.

The record, however, does not support the defendant's argument that his actions were either partially justified or that he was acting under duress or the domination of another. Clark knew his codefendants prior to the offenses. That Clark may not have had any control over the others does not mean that his actions were not voluntary. He chose to participate in the burglary and the robbery. Any mitigation must be based upon his youth. In light of the strength of the applicable enhancement factors and the serious nature of the offenses, however, we find that, on balance, the record supports the imposition of the maximum sentence for both of Clark's convictions.

B. Consecutive Sentencing

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, classifications qualifying one for consecutive sentences were first set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case, our supreme court held that aggravating circumstances must be present before placement in any one of the classifications. In State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. The 1989 act is, in essence, the codification of the holdings in Gray and Taylor. Consecutive sentencing may be imposed in the discretion of the trial court upon a determination that one or

more of the following criteria² exist:

- (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

In Gray, our supreme court had ruled that before consecutive sentencing could be imposed upon the dangerous offender, as now defined by subsection (b)(4) in the statute,

²The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Sentencing Commission Comments.

other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses.

More recently, in State v. Wilkerson, _____ S.W.2d _____ (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender "unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." Slip op. at 13. The Wilkerson decision, which modified somewhat the strict, factual guidelines for consecutive sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as "a human process that neither can nor should be reduced to a set of fixed and mechanical rules." Slip op. at 13-14 (footnote omitted).

In sentencing these defendants, the trial court found all four to be dangerous offenders and also noted that the defendant Turner committed the offenses while on probation. See Tenn. Code Ann. § 40-35-115(4) and (6). While the trial judge found that each defendant had demonstrated little or no regard for human life and did not hesitate about committing a crime in which the risk to human life is high, that is only one factor to consider under Wilkerson. The trial court did not make an analysis on the record of the other necessary

components. Because the presumptive correctness of a sentence is conditioned upon the full consideration of all the statutory sentencing principles and all other relevant factors, our scope of review is de novo. See State v. Ashby, 823 S.W.2d 166 (Tenn. 1991); State v. Shelton, 854 S.W.2d 116 (Tenn. Crim. App. 1992).

Our de novo review of the record clearly supports the finding that defendants Turner, King, and Davis not only qualify as dangerous offenders but also meet the three other criteria and thus merit consecutive sentencing. Moreover, defendant Turner concedes that he was on probation at the time of these offenses; that alone is sufficient to support the imposition of consecutive sentences without any further consideration in his case.

The record, however, presents a much closer issue with respect to the defendant Clark, who obviously committed two dangerous crimes and, in consequence, qualifies as a dangerous offender. The forceful, well-founded dissent to this opinion by our former Presiding Judge Russell reflects not only the best argument for the imposition of a consecutive sentence for Clark but also the understandable, general intolerance of any leniency in the sentencing of a dangerous offender; we may not, however, base the length of the sentence upon the possible release eligibility of Clark, as the dissent so vigorously suggests that we do. The 1989 Act does not permit such speculation. The ultimate question for this court is whether Clark meets all the criteria first set out in Gray and

more recently reconfirmed in the Wilkerson decision. He must qualify under each of the three remaining factors before the two sentences may be "stacked."

We will attempt to place this issue in proper context. Clark was only eighteen years old at the time of the offenses. Each of his codefendants were older. Although Clark had previously dropped out of school for disciplinary reasons, he thereafter obtained his GED. The only charge placed against Clark while he was a juvenile was never prosecuted; thus, he had no prior criminal record of any kind at the time of this offense. Clark was last to the crime scene and, while a participant in the burglary and robbery, did not join the other three defendants in the assaults, facts corroborated by the victim. He was the first to leave the residence and apparently urged the others to do likewise. Although a bit sporadic, Clark does have some work history. He had summer employment during some of the time he was in school, worked at a Nashville restaurant for a time, and held employment at Shoney's for a year during 1990 and 1991.

Our statutory scheme requires individualized sentencing. The 1989 Act must be "applied in an individual case to a particular person based upon the facts of that case and the circumstances." State v. Moss, 727 S.W.2d 229, 235 (Tenn. Crim. App. 1986). Had the trial judge, in accordance with the directives in Ashby, placed his reasons for "stacking" Clark on the record, our decision of whether to impose consecutive sentences for the burglary and the robbery may have been an

easier task. If Clark's sentence could be made based upon the actions of all of the defendants, he would clearly qualify for consecutive sentences.

Thus, we begin with the determination that Clark meets the definition of dangerous offender "whose behavior indicates little or no regard for human life, and no hesitation about committing the crime when the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(4). Secondly, we would also find support in this record that the circumstances were aggravated. Thirdly, the aggregate term of eighteen years reasonably relates to the seriousness of the offense. Our final consideration, which we must make from this "cold" record, is to determine whether a six-year consecutive sentence, over and above the twelve-year sentence, is necessary to protect the public. Stated differently, does the record establish that Clark may qualify as a reasonable risk for rehabilitation at some point before service of the eighteen-year term?

The victim, whose testimony was remarkably charitable under these circumstances, described Clark as "scared looking" during the commission of the offenses, "not in control," and "confused about what was going on." The trial court characterized her testimony as "truthful" and "conscientious." The trial judge expressed concern that the defendant's in-court apology was insincere; yet the presentence report described Clark as remorseful for his acts, in good physical and mental condition, and without any prior history of illegal

drug usage. The investigator testified that Clark had forthrightly acknowledged his role in the offenses, was "ashamed" of his actions, cooperated fully in the interviews, and "impressed [her] with his sincerity."

That Clark achieved a GED while in jail awaiting this trial is a positive indication that he has the potential for rehabilitation. Moreover, the trial judge acknowledged that Clark's degree of involvement in the incident would not have warranted convictions for assault or rape, because he did not "participate in it" and "there was no proof [he] did." That he exercised at least some discretion is noteworthy. Clark's background, which indicates continuing family support, is clearly superior to that of any of the other three defendants. This suggests some hope for a turnaround in behavior.

From all of this, it does not appear, at least at this time, that a consecutive sentence of another six years over and above the twelve-year term, is absolutely necessary "to protect the public." Clark's refusal to participate in the assaults of the victim suggests a modicum of humanity. To attribute the vicious acts of the other three--older, more hardened criminals--to Clark is not warranted under the mandate of "individualized sentencing." The issue is so close that perhaps some benefit of the doubt should be given a first time, eighteen-year-old offender. The six and twelve year terms are the maximum possible for the aggravated burglary and aggravated robbery offenses under the provisions of the sentencing act. Those sentences are just under these

circumstances. An aggregate twelve-year prison sentence should be adequate to protect the public for an adequate time, on one hand, and provide Clark, on the other, with a one-time opportunity at a rehabilitated lifestyle--while he is still at a relatively young age.

Conclusion

The trial court's judgment is modified to concurrent sentences for defendant Clark and affirmed in all other respects.

GARY R. WADE, JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

(SEE PARTIAL DISSENTING OPINION)
WILLIAM S. RUSSELL, SPECIAL JUDGE